Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,
TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION

June 7, 1993

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Summary of Argument

Time Warner Entertainment Company, L.P. ("TWE"), hereby responds to certain Petitions for Reconsideration filed in the "must-carry" rulemaking implementing §§ 4, 5 and 6 of the Cable Television and Consumer Protection Act of 1992. TWE herein argues that:

- The WGN factors are appropriate for determining whether material is program related.
- Broadcast stations electing retransmission-consent status on June 17, 1993, give up all must-carry rights and are not entitled to carriage between June 17 and October 6.
- Any station that fails to make an election on June 17 should be deemed to have elected retransmission-consent status and to have consented to carriage. Alternatively, if the default is must-carry status, a station should be deemed to have agreed to whatever channel position the cable operator selects.
- The minimum length of time for which a broadcaster must indemnify a cable operator for copyright liability should be three years.
- Cable operators need not provide broadcast stations with their future business plans or strategies that might alter copyright liability beyond being required to provide good-faith liability estimates and statements of account.
- The Commission should not alter the manner in which a broadcast station's copyright liability is calculated.

- Cable operators need not carry broadcast stations whose signal is of inadequate quality, nor need they continue carrying such stations, if they are currently carrying them, pending resolution of the signal quality dispute.

- There should not be a presumption that all broadcast stations are significantly viewed in their ADI.

- ADI revisions should be done on a station-by-station basis, not a community-by-community basis.

- There are no retransmission-consent rights for any superstation that is satellite-delivered.

- Wireless operators must obtain retransmission consent from broadcast stations unless they divest themselves of ownership and control of antennae that they have provided to subscribers.

Preliminary Statement

On March 29, 1993, the Commission's released a

Report and Order in MM Docket No. 92-259 (hereinafter "the

"program-related material carried in the vertical blanking interval or on subcarriers". 2/ The NAB asks for reconsideration of the Commission's decision to use the factors enumerated in WCN Continental Broadcasting v. United

not offer any reason why the term "program related" should have different meanings for must-carry and copyright purposes, and points to no evidence that Congress intended different meanings.

Applying its definition, the NAB further contends that Nielsen program-identification codes carried on line 22 are program related because that material "by definition relate[s] to the main program service, since its entire function is to describe that service". NAB 5 n.7. The Commission has correctly concluded that such material is not program related. Order ¶ 81. Nielsen codes are intended to measure viewership levels and identify programs for that purpose. They are neither intended to be seen by viewers, nor intended to be an integral part of the program presented. Accordingly, there is no basis in law or policy

II. STATIONS ELECTING RETRANSMISSION-CONSENT STATUS ARE NOT ENTITLED TO CARRIAGE BETWEEN JUNE 17 AND OCTOBER 6.

The NAB asks the Commission to clarify that stations electing retransmission-consent status on June 17, 1993, retain must-carry rights until October 6, 1993. NAB 5. The requested clarification contrasts with the NAB's admission that "stations must choose between must carry and retransmission consent rights, and that a station electing the right to control retransmission of its signal by a cable system will not retain its must carry rights". NAB 6. The NAB's admission--not its suggested clarification--comports with the clear language of the statute. See § 325(b)(3)(B)(4) ("[i]f [a] station elects . . . to exercise its right to grant retransmission consent . . . , the provisions of section 614 shall not apply"). 4/

The NAB further argues that, without a rule requiring carriage until October 6, cable operators will likely drop or reposition local stations to gain an advantage in retransmission-consent negotiations, and that drops and repositionings would be "expensive and confusing". But there is nothing in the record indicating a likelihood

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4/ Because stations electing retransmission-consent status give up rights they might otherwise have had under § 614, a cable operator should be free to enter into partial carriage agreements with stations electing retransmission-consent status. TWE supports the arguments of the NCTA and Newhouse on this point. NCTA 18; Newhouse 5.

that cable operators will drop or reposition stations after June 17. The NAB's argument rests on bare speculation and cannot override clear statutory language.

III. BROADCAST STATIONS THAT FAIL TO MAKE AN ELECTION HAVE NO CHANNEL-POSITIONING RIGHTS.

Under the Order, a broadcast station that fails to make an election between must-carry and retransmission-consent status gains must-carry status nonetheless. Order ¶¶ 158-59. The NAB urges the Commission to amend its rules to require cable operators to carry such nonelecting stations on one of the three channel positions set forth in the statute, and would permit cable operators to choose

159. The Commission could have put this concern to rest by adopting the rule suggested by TWE that a nonelecting station is deemed (1) to have elected retransmission consent status, and (2) to have given consent. Apparently, the Commission overlooked and failed to consider the second step in TWE's argument.

TWE believes that a rule according an even greater windfall to nonelecting stations--channel-positioning rights--would also violate the First Amendment. And, there are at least four additional reasons for rejecting the NAB's suggested rule. First, the Commission's rationale for adopting a default-election rule in no way supports the NAB's argument. Carriage alone addresses the Commission's concern with access. Second, the channel-positioning rights of a nonelecting station may conflict with channel-positioning rights of electing stations, and there is no equity in burdening cable operators and electing stations with such conflicts. Third, in the Order, the Commission sought to provide "stations [with] incentives to make an affirmative election". Order ¶ 159. Giving channel-positioning rights to stations that fail to make an election would obviously weaken the incentive to make an affirmative election. Fourth, the statute allows channel positioning to be based on mutual consent, and there is no reason why the

Commission could not deem nonelecting stations tacitly to have consented to the channel position selected by the cable operator.

IV. THE COMMISSION SHOULD REJECT THE RULES THAT THE NAB PROPOSES WITH RESPECT TO COPYRIGHT-LIABILITY ISSUES.

The NAB asks the Commission to amend or clarify the procedures to be observed by stations that must reimburse cable operators for additional copyright liability to acquire must-carry status. 5/ First, the NAB suggests that, to retain must-carry status, a broadcast station should not be required to commit to indemnify a cable operator for more than one year, saying that it is "unfair" to require a broadcast station to commit to indemnify for the full three years of its must-carry election period. NAB 10.

5/ On May 13, 1993, the NAB, together with INTV, filed a "Request for Declaratory Ruling", which raised, among other things, some copyright-indemnification issues. The Commission ruled on that Request in a Clarification Order dated May 28, 1993. TWE here addresses those issues not or not fully resolved in the Clarification Order.

TWE notes, however, that, in the Clarification Order, the Commission held that cable operators must respond within three business days to a request for information regarding copyright liability. Three days is simply not enough time. In light of the time pressures currently facing cable

The Commission should not adopt the NAB's suggestion. The statutory scheme is premised upon an election binding a broadcast station for three years. See § 325(b)(3)(B). There is nothing in the statute suggesting an exception for broadcast stations whose carriage causes additional copyright liability. Moreover, under the NAB's suggested rule, apparently, stations would be entitled at any time during a three-year election period to re-evaluate whether must-carry protection is still worth copyright-liability reimbursement. Thus, for example, stations could demand must-carry protection in year 1, decide to forgo it

Second, the NAB asks for a rule requiring cable operators to provide broadcasters with advance notice of plans that might affect a broadcaster's reimbursement liability. The NAB cites no support in law, and there is certainly no basis in policy for such a rule. For one thing, the NAB's suggested rule would require cable operators to reveal confidential business plans to their acknowledged competitors. For another thing, the Order and the Clarification Order already require cable operators to provide broadcast stations with estimates of expected copyright liability. Order ¶ 114; Clarification Order ¶¶ 17, 19. This obligation addresses any concerns that broadcasters might have, and no more should be required.

Third, the NAB requests that the Commission clarify the manner in which a broadcast station's copyright liability is determined. Consistent with the language of the statute, the Commission has established that each broadcast station is responsible for the increased copyright costs specifically associated with carriage of its signal. See § 534(h)(1)(B)(ii). 7/ The NAB acknowledges that cable operators are entitled to receive the full amount of their increased copyright liability due to the must-carry

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7/ See also Conference Report at 71 (broadcast station must reimburse the "incremental copyright charges incurred by the cable system from carriage of such a station").

scheme, NAB 12, but challenges the Commission's decision to calculate a station's incremental liability based on the order in which stations attain must-carry status, NAB 11. The NAB contends that, because of the royalty-rate structure, increments of liability decline as more distant signals are added and thereby create an incentive for broadcast stations to delay in offering reimbursement.

This incentive simply does not exist. Most cable systems already carry a full complement of distant signals, so that any additional distant signals will be "3.75 signals" for which incremental copyright liability is of equal amount. Accordingly, there is no reason why the Commission should reconsider its decision to measure indemnification liability based upon the order in which stations attain must-carry status. Should, however, the Commission decide to alter the manner in which liability is calculated, it must heed the clear language of the statute, which entitles cable operators to "any increased copyright liability" arising from the carriage of such stations. § 614(b)(10)(B). 8/

8/ INTV suggests that the Commission should clarify that broadcast stations are not required to pay fees for copyright liability for any period of time before June 2. INTV 5. INTV overlooks that, with respect to stations carried on June 2, a cable operator must pay royalties for the entire copyright-reporting period (i.e., back to January 1). The statute clearly requires a broadcast

V. BROADCAST STATIONS WHOSE SIGNAL IS OF INADEQUATE QUALITY ARE NOT ENTITLED TO CARRIAGE.

Cable operators cannot be required to carry broadcast stations that do not deliver a good-quality signal to a cable system's principle headend. § 534(h)(i)(B)(iii). Citing concerns that cable operators might abuse this exception, the NAB asks the Commission to modify its rules to require a cable operator currently carrying a broadcast signal that it claims fails to provide an adequate signal to continue carrying that station until the dispute is resolved or until the station has been given a reasonable opportunity to improve its signal. NAB 13.

In the Clarification Order, the Commission expressed a belief that "it is unlikely" that stations currently carried by a cable operator do not deliver a good quality signal to the system's principle headend and that "few questions will be raised regarding the continued carriage of such stations". Clarification Order ¶ 13. The Commission did not definitively decide, however, whether

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station to pay the entire amount of increased copyright liability associated with its carriage. Thus, any station that was added on June 2 and that increases an operator's liability must reimburse the operator for all increased copyright liability, back to the beginning of the reporting period.

cable operators must carry such stations until the dispute about signal quality is resolved. 9/

TWE suggests that the Commission should clarify this point but should reject a rule requiring carriage during the pendency of signal-quality disputes. As previously noted by the NCTA in its opposition to the NAB's Request for Clarification, a rule requiring carriage until signal-quality disputes have been resolved eliminates any incentive for rapid dispute resolution. Moreover, from the fact that a cable system currently carries a broadcast station voluntarily, it simply does not follow that the station delivers a good-quality signal. Many cable systems that voluntarily carry broadcast stations have invested significant amounts of money in equipment to be able to receive a good-quality signal, and such cable operators should not be punished for having made such investments. To the contrary, the statute is clear that the broadcast station bears responsibility "for the costs of delivering to

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9/ In the Clarification Order, the Commission ruled that cable operators must respond to a request for signal-strength-measurement information within three business days. Clarification Order ¶ 5. For the same reasons as those set forth above with respect to responses to requests for information regarding copyright liability, see supra fn. 5, TWE suggests that cable operators should be permitted seven business days to respond.

the cable system a signal of good quality".

§ 534(h)(1)(B)(iii).

VI. THERE SHOULD BE NO PRESUMPTION THAT STATIONS ARE SIGNIFICANTLY VIEWED WITHIN THEIR ADI.

INTV asks the Commission to adopt a rule creating a presumption that stations are significantly viewed within their Area of Dominant Influence ("ADI"). Nothing in the statute would support such action by the Commission, and the adoption of such a rule would stand in stark contrast to the Commission's long-standing procedure for determining whether a station meets the significantly viewed test. See 47 C.F.R. § 76.54. Under that procedure, a station bears the burden of demonstrating with objective data that it is significantly viewed. There is no reason to abandon that procedure. Indeed, adopting the sweeping rule sought by INTV would dramatically increase the Commission's administrative burden. Stations that believe they satisfy the significantly viewed standard have already come forward and made that showing. If INTV's presumption were adopted, however, other broadcast stations and cable operators would be forced to pursue proceedings with the Commission to overcome the presumption. There is no reason to disturb the procedures currently in effect.

VII. COMMUNITY REVISIONS SHOULD BE MADE ON A STATION-BY-STATION BASIS.

INTV argues that, when, with respect to a particular television station, additional communities are included within its television market, every station in that community should be added to that market. INTV's argument runs counter to the clear language of the statute. Section 534(h)(1)(C) does permit the Commission to include communities within a television market, but is clear that the Commission may do this only "with respect to a particular television broadcast station"; speaks of including communities within "its" (that is, the station's) and "such station's" market; and requires the Commission to take into account factors concerning a particular station. Clearly, then, the statute contemplates that a community be included within a market with respect to a particular station only, and not with respect to all stations within

delivery of the superstation's signal to a cable operator. Tribune and INTV are wrong. The superstation exception applies to a superstation "if such signal was obtained from a satellite carrier". § 325(b)(2)(D). Thus, the language of the statute is clear that, if a cable operator receives the superstation's signal from a satellite, the superstation is without retransmission-consent rights, even within its "home" market. Moreover, the statute is clear that this holds true even if a particular cable operator receives the superstation's signal off the air, so long as any other cable operator receives the signal from a satellite. See Newhouse 3-4.

IX. TO BE EXEMPTED FROM THE RETRANSMISSION-CONSENT REQUIREMENT, MMDS OPERATORS MUST RELINQUISH OWNERSHIP OF ANTENNAE THAT THEY HAVE PROVIDED TO SUBSCRIBERS.

WCA argues that it is "essential" that the Commission eliminate the requirement that an MMDS operator must divest itself of ownership and control of a VHF/UHF antenna provided to a subscriber for the MMDS operator to be able to avoid retransmission-consent obligations. WCA 3-4. It is not immediately clear why this is "essential", because the statute clearly provides that retransmission-consent obligations apply to any "multichannel video programming distributor", § 325(b)(1), which term, of course, includes an MMDS operator, § 522(12). There is not a hint in the

statute that MMDS operators should be treated more favorably than other distributors, and the legislative history shows that this is no accident. 10/ The general rule is, then, that, where an MMDS operator provides its subscribers with broadcast signals, the operator is required to obtain retransmission consent. And, clearly, reception by an MMDS subscriber of broadcast signals through an antenna owned by the MMDS operator more closely resembles reception of such signals by a cable subscriber than off-air reception by a viewer who owns his own antenna. Accordingly, there is no reason for the general rule to yield. 11/

10/ See Senate Report at 34 ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means").

11/ Newhouse and CATA request reconsideration of the Commission's decision to require retransmission consent for radio signals. Newhouse 8-9; CATA 7. TWE supports their position, and adds two points. First, given the enormous number of radio stations, it is simply impracticable for a cable operator to obtain retransmission consent with respect to radio signals. Second, cable operators do not possess the technology to block the signals of radio stations that refuse to consent while retransmitting the signals of those that do consent. Unless the Commission changes its rule with respect to radio signals, then, cable operators will have no choice but to stop carrying radio signals.

Conclusion

For the foregoing reasons, the Petitions for Reconsideration and Clarification opposed herein should be denied.

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I hereby certify that, on June 7, 1993, copies of the foregoing "Opposition of Time Warner Entertainment Company, L.P., To Petitions for Reconsideration or Clarification" were served by First Class Mail, postage prepaid to the following:

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